

OFFICE OF THE DEFENDER GENERAL

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MEMORANDUM

**TO: Samantha Sweet, Director of Mental Health, DMH
Karen Barber, Esq., General Counsel, DMH**

**FROM: Matthew Valerio, Defender General
Office of the Defender General**

RE: Act No. 57 (S.3), effective July 1, 2021, An act relating to competency to stand trial and insanity as a defense: Forensic Working Group Report

STATEMENT OF OFFICE OF THE DEFENDER GENERAL

Statutory Authority:

Act No. 57 (S.3), effective July 1, 2021, entitled “An act relating to competency to stand trial and insanity as a defense,” in part, required the Department of Mental Health (“DMH”) to convene the Forensic Care Working Group to report to the General Assembly on issues related to the mental health care treatment of criminal defendants.

Act No. 57, Section 6 provides as follows:

- (a) On or before July 15, 2021, the Department of Mental Health shall convene working groups of interested stakeholders to provide recommendations necessary to carry out the provisions in subsections (b) and (c) of this section, including as appropriate:
- (1) a representative from the Department of Corrections;
 - (2) a representative from the Department of Disabilities, Aging, and Independent Living;
 - (3) a representative from the Department of Buildings and General Services;
 - (4) the Chief Superior Judge;
 - (5) a representative from the Department of State’s Attorneys and Sheriffs;
 - (6) a representative from the Office of the Attorney General;
 - (7) a representative from the Office of the Defender General;
 - (8) the Director of Health Care Reform or designee;
 - (9) a representative, appointed by Vermont Care Partners;
 - (10) a representative, appointed by Vermont Legal Aid’s Mental Health Project;
 - (11) a representative, appointed by the Vermont Medical Society;
 - (12) three crime victims representatives, appointed by the Vermont

- Center for Crime Victim Services;
- (13) the Mental Health Care Ombudsman established pursuant to 18 V.S.A. § 7259 or designee;
- (14) a representative of the designated hospitals, appointed by the Vermont Association of Hospitals and Health Care Systems;
- (15) three individuals with lived experience of mental illness, at least one of whom has lived experience of the criminal justice system or the civil commitment system, or both, appointed by Vermont Psychiatric Survivors;
- (16) a representative, appointed by the Vermont Developmental Disabilities Council; and
- (17) any other interested party permitted by the Commissioner of Mental Health.

(b)(1) On or before August 1, 2022, the Department of Mental Health shall submit a final report to the Joint Legislative Justice Oversight Committee and the Chairs of the House Committees on Corrections and Institutions, on Health Care, and on Judiciary and of the Senate Committees on Health and Welfare and on Judiciary addressing:

- (A) any gaps in the current mental health and criminal justice system structure related to individuals incompetent to stand trial or who are adjudicated not guilty by reason of insanity;
- (B) opportunities to:
 - (i) improve public safety and address the treatment needs for individuals incompetent to stand trial or who are adjudicated not guilty by reason of insanity; and
 - (ii) consider the importance of victims' rights in the forensic care process;
- (C) competency restoration models used in other states, including both models that do not rely on involuntary medication to restore competency and how cases where competency is not restored are addressed;
- (D) models used in other states to determine public safety risks and the means used to address such risks, including guilty but mentally ill verdicts in criminal cases;
- (E) due process requirements for defendants held without adjudication of a crime and presumed innocent;
- (F) processes regarding other mental conditions affecting competence or sanity, including intellectual disabilities, traumatic brain injury, and dementia;
- (G) models for forensic treatment, including the size, scope, and fiscal impact of any forensic treatment facility; and
- (H) any additional recommendations.

Introduction:

After more than a year of testimony, presentations and discussions, it is fair to say that the Forensic Working Group did not come to consensus on all issues. However, from the perspective of the Office of the Defender General there are certain consistent themes of agreement that have arisen, particularly among those who interact with mentally ill individuals involved with the criminal justice system.

Observed Points of Agreement:

1. There appear to be more mentally ill individuals coming to the attention of law enforcement and the criminal justice system than the various systems have previously experienced, and the current system lacks the capacity to address the needs of these individuals.
2. There are insufficient resources available to appropriately address the needs of mentally ill individuals before, during and after their involvement with the criminal justice system.
3. Relevant to this inquiry, there are insufficient screening resources (for example, psychiatrists) available to timely evaluate individuals ordered evaluated for competency and/or sanity by the Court system.
4. There is a need for a forensic facility of some variety in the State of Vermont. The last semblance of a forensic mental health facility was washed away with hurricane Irene.
5. There is a need for more robust follow-up with individuals released into the community on orders of non-hospitalization.
6. There is a legitimate victim interest in being notified about the release and status of mentally ill individuals who are released on orders of non-hospitalization.
7. The State and legal representatives of mentally ill individuals have an interest in being notified about the release and status of mentally ill individuals who are released on order of non-hospitalization.
8. The vast majority of mentally ill individuals who become involved in the criminal justice system, while at times perceived as an annoyance to members of the public, do not pose a threat to public safety.
9. There is a very small minority of individuals who are mentally ill who are released into the community by DMH after treatment pursuant to an order of hospitalization, or on an order of non-hospitalization, that have caused catastrophic damage to themselves and others in the community as a result of their mental illness.
10. The predictability of the behavior of mentally ill individuals is not an exact science, and no amount of resources, systemic change, or statutory revision will 100% guarantee public safety in all instances.

ODG Proposed Action Areas:

1. Vermont should establish a new forensic mental health treatment facility.

There is an obvious need for a facility staffed with appropriately trained and qualified individuals to address the screening and treatment needs of mentally ill individuals involved in the criminal justice system.

This statement begs a number of questions. How big should it be? What is the purpose of the facility? Should there be competency restoration? Should it only focus on general treatment to render an individual safe for release to the community? Should it focus on the treatment, care and segregation of mentally ill individuals who may not be safe to release to the community?

If the goal is to provide inpatient treatment to every mentally ill individual who is a nuisance to the community, with dozens of police interactions, but only low-level misdemeanor offenses, then a forensic facility would need 200 beds.

If the goal is to focus on the most acute cases, then the facility (or facilities) may well look like a 20-bed facility in the North, and a 20-bed facility in the South.

2. Vermont should change the statute to allow doctorate level psychologists (PhD or PsyD) to opine on the competency and sanity of individuals who present as mentally ill in the criminal justice system.

Anecdotally and statistically the incidence of anxiety, depression, suicide, self-medication and drug overdose, and an exacerbation of pre-existing conditions of individuals with major mental illness, has risen in the wake of the COVID pandemic. This has stressed Vermont's preexisting mental health treatment system, and has resulted in more interactions between law enforcement and individuals with mental illness. The resulting impact on the criminal justice system has been overwhelming.

As a result, there is a massive backlog in the number of cases awaiting competency and sanity evaluations in the criminal justice system. The statutory preference for psychiatrists unnecessarily limits the qualified pool of individuals available to perform these evaluations, which has led to DMH contracting with out of state psychiatrists who perform remote competency and sanity evaluations via video.

It has been the experience of those in the defense community that these evaluations are cursory and are much less accurate and valuable than in person evaluations. In addition, the backlog for getting a competency and/or sanity evaluation is anywhere from 6 to 18 months from the time the evaluation is ordered.

Psychiatrists routinely rely upon the clinical and testing work of doctorate level psychologists in addition to their own clinical observations. The statutory reliance and preference for psychiatrists is an anachronism that limits the available pool of evaluators and, with the exodus of forensic psychiatrists from the state, has created a crisis in this Court docket.

Doctorate level psychologists are fully qualified to perform this work and would provide substantial relief to the criminal justice system, likely at a lower cost.

3. Vermont should establish more robust follow-up with individuals on orders of non-hospitalization to ensure their stability in the community.

The ODG envisions a treatment-oriented supervision unit housed in DMH that is akin to a DOC Probation Department, but whose focus is on regularly checking on the health, safety, compliance and well-being of mentally ill individuals who have been released to the community on orders of non-hospitalization. These supervisors would, if necessary, be capable of acting to amend ONH conditions, with the ability to temporarily hospitalize mentally ill individuals who are not in compliance with their ONH conditions and present an imminent danger to themselves or others.

The focus of this unit must be treatment of individuals subject to an ONH. This unit is not intended to be a punitive substitute for probation. The focus must be restoring mental health and aiding community reintegration.

4. Judicial review of DMH decisions to release mentally ill individuals involved in the criminal justice system who have been initially held on an order of hospitalization (whether incompetent or insane) for certain serious crimes.

There is a need to focus this inquiry on the most concerning and acute cases that cause the most damage to society and victims. The ODG believes that it is entirely reasonable for there to be judicial review of cases involving individuals held on an order of hospitalization for actions that gave rise to charges which could have a penalty of life in prison, i.e., murders, sex cases, kidnapping, etc.

Full due process rights, including the right to counsel and the right to a hearing before a Superior Judge must be afforded to the individual who DMH has deemed eligible for community reintegration. DMH would have representation by the Vermont Attorney General.

This judicial review of DMH action would provide some level of insulation from political policy, resource issues, and any considerations other than the mental health of the individual and its impact on public safety that might influence DMH decisions to release an individual to the community.

5. The ODG does not oppose State and victim notification regarding the community release of individuals who have previously demonstrated a danger to others.

This is current law. However, if current resources are insufficient to implement the law, then those resources should be allocated.

6. Individuals with specific mental health treatment credentials should be embedded with law enforcement to address mental health emergencies in the community.

The ODG does not make this suggestion as part of the movement to “defund the police” but as a supplement to law enforcement who, while trained to some degree in de-escalation, are not primarily focused or trained on how to address or deescalate mental health emergencies in the community. This suggestion is intended to assist law enforcement and enhance public safety and the safety of responding officers where a mental health crisis emergent in the community.

7. Significant additional resources should be dedicated to early recognition and treatment of mental illness.

Perhaps most importantly, early recognition and increased availability of treatment of mental illness in the general population is the best way to reduce violence, crime and the subsequent damage to our communities.

Mental illness is a problem in general in Vermont. Anecdotally and statistically the incidence of anxiety, depression, suicide, self-medication, drug overdose, and an exacerbation of pre-existing conditions of individuals with major mental illness, has risen in the wake of the COVID pandemic. This has stressed Vermont’s preexisting mental health treatment system, and has resulted in more negative interactions between law enforcement and the general public with individuals with mental illness. The resulting impact on the criminal justice system has been overwhelming. Addressing the issue of

mental illness before people become involved in the criminal justice system can only aid in the reduction of incidents and increase public safety.

Conclusion:

While it became apparent early on due to the expansive make-up of this working group that a true consensus on the issues would be unachievable, it is clear to the ODG that there are particular areas of factual agreement, and some discrete areas of consensus, even if the details are yet to be worked out.

The ODG offers this memorandum with suggestions to assist in moving the discussion forward with the Legislature and welcomes and comment or suggestions.

Respectfully submitted.